Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

EMIL GARDNER,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

JOHN P. MORRIS
Attorney for Petitioner
142 W. Broad Street, Suite B
Post Office Box 299
Bridgeton, New Jersey 08302
(856) 453-1000

171006

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a reasonable, particularized suspicion standard can be satisfied under this Court's Fourth Amendment totality-of-the-circumstances analysis where the stop of a motor vehicle is preordained by instructions to a road trooper at the inception of a four-hour surveillance [undertaken to corroborate an effectively anonymous tip and thereby secure a search warrant] and the motor vehicle stop is automatically executed by that road trooper on those earlier standby instructions at the close of that surveillance — with no interim observation/corroboration of illegal or even unusual activity, but only neutral or non-criminal conduct.

2. Whether the totality-of-the-circumstances test structured by this Court for the guidance of reviewing courts in assessing a reasonable suspicion determination, requires consideration of not only observed facts of non-criminal conduct and claimed inferences of suspicion advanced by law enforcement therefrom but also facts erroneously claimed or those for which no inference of suspicion has been claimed.

PARTIES TO THE PROCEEDINGS

Petitioner is Emil Gardner, defendant in the criminal proceedings below. Respondent is State of New Jersey. There were two co-defendants, Ronald Paton and Bruce Gardner, brother of Petitioner. Defendant Paton's conviction was affirmed, *see* the Appellate Division's Opinion at Appendix C and defendant Bruce Gardner's conviction was also affirmed by the Appellate Division, *see* Appendix B at 3a, 4a, *State v. Bruce Gardner*, Docket No. A-4756-97T3.

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Petitioner Emil Gardner respectfully petitions for a Writ of Certiorari to review the decision of the New Jersey Superior Court, Appellate Division in this case.

OPINIONS BELOW

The decision of the Superior Court of New Jersey, Appellate Division on petitioner's direct appeal is found at Appendix B. The decision of the Superior Court of New Jersey, Appellate Division referenced in the Appellate Division's direct appeal opinion is found at Appendix C. The Order of the New Jersey Supreme Court denying petitioner's petition for certification and dismissing petitioner's appeal is found at Appendix A. The bench opinion of the New Jersey Superior Court, Law Division (Honorable Georgia M. Curio, J.S.C.) denying defendants' (Paton, Bruce Gardner and Emil Gardner) Motion to Suppress is found at Appendix D. None of the opinions are reported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Judgment/Order of the Supreme Court of New Jersey denying certification to and dismissing appeal from the decision of the Superior Court of New Jersey, Appellate Division was entered on September 10, 2001.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

STATEMENT OF THE CASE

On October 11, 1995, the New Jersey State Police (Dets. Silver and DeSantis) undertook surveillance of property owned by Ronald Paton to corroborate information provided by an individual identified only as "confidential source No. 3", so that ultimately a search warrant for the Paton premises could be obtained at 27a. While there also were two other confidential sources (Nos. 1 and 2) who had disclosed information the year before as to marijuana growing activities, no further action was taken on that information "as there was not sufficient 'concrete' information" provided by those two informants at 22a, 23a. Confidential source No. 3 made contact with the New Jersey State Police between October 1 and October 8, 1995 "some 16 months or so after contact with confidential sources Nos. 1 and 2" at 23a. Confidential source No. 3 was the only one of those three individuals to indicate that petitioner may be "involved in the scheme" at 24a. Additionally, during source No. 3's personal interview with the State Police, he/she "made a telephone call to either ascertain or confirm the location of the harvested crop . . . [which] information was not related as an absolute certainty [and] was based on what someone else had told him/her" at 26a, effectively an anonymous tip as to the location of the marijuana crop.

A few days later the surveillance was undertaken. Dets. Silver and DeSantis began the surveillance at 11:00 a.m. and broke at noon for a half hour lunch at 27a. Upon their return, a tan colored Ford van was observed to be parked behind the outbuilding on the property and was partially obscured from view. Road Trooper Myers was then "alerted to be on standby to stop the van should it leave the property" as Det. Silver "had made a determination that he wanted to have the van

stopped if it left the premises at any time while the property was under surveillance" in that he "specifically wanted to ascertain, as part of his investigation, whether there was an odor of marijuana detected about the individual or individuals who was or were in that vehicle and also wanted to identify any additional participants who may have been involved" at 28a, 29a.

The motion judge's characterization of the informants was that they were "more aptly designated 'untested informants' and as such some showing of reliability must be made", [*i.e.*, that there was no "veracity" established for these informants], at 35a; the basis of knowledge for confidential source No. 3 "was not as to where the marijuana had been grown nor whether the harvested crop was at Mr. Paton's property", at 26a; and that while "there was a good probability that the harvested crop was at Paton's. This information was not related as an absolute certainty [and] was based on what someone else had told [confidential source No. 3]", effectively, an anonymous tip, *ibid.*; no future behavior of any of the suspects was predicted in the tip of No. 3 or the anonymous tip obtained by No. 3 as a result of the telephone call, and surveillance of the "Paton property was undertaken on October 11, 1995 by Det. Silver . . . to corroborate the information provided by confidential source No. 3 in order that ultimately a search warrant for the premises could be obtained" at 27a.

While the surveillance extended from 11:00 a.m. until 4:00 p.m. [with a lunch break by the officers] absolutely no activity was observed until approximately 4:00 p.m. when a red station wagon entered the Paton driveway and "the driver made eye contact with Silver" and that vehicle "came to rest between the house and the out building" but Det. Silver "was

unable to see the driver exit the red station wagon and could not ascertain whether that individual entered either of the structures" at 27a, 28a; shortly after that the van departed and no one attempted to identify any occupants as the van left the property. *Ibid.* Rather road Trooper Myers stopped the van as "Myers was alerted to be on standby to stop the van should it leave the property", that instruction having been given by Det. Silver to determine, "as part of his investigation, whether there was an odor of marijuana detected about the individual or individuals who was or were in the vehicle and [he] also wanted to identify any additional participants who may have been involved" at 28a, 29a. During the surveillance, "no one who might be considered to be serving as a lookout was seen and no illegal activity was observed". *Ibid.* Likewise, "no motor vehicle offense [was] committed by [the driver of] the van" before it was stopped by Trooper Myers, at 29a. The driver of the van was only identified by Trooper Myers after he had stopped the vehicle at 29a.

The motion judge opined at 35a, 36a that the observations of the State Police at the surveillance scene corroborated the information supplied by the confidential sources. Those observations were:

> (1) "a van owned by an individual who had been identified by at least one confidential source as a participant in the illegal activity (i.e. Emil Gardner) was seen at the location at the time of the surveillance",
>
> (2) "an extended period of inactivity, estimated to have been approximately four hours, after the van arrived at the premises, was consistent with the function of processing and packaging

> marijuana within the experience and training of the officers undertaking the surveillance", coupled with
>
> (3) "the appearance at the scene of a station wagon owned by another individual identified as a participant in the illegal activity [i.e. Ronald Paton]",
>
> (4) "shortly after which the van was driven away from the surveillance location [which] raises suspicion", with the motion judge adding that
>
> (5) the "van was parked in such a way as to be partially obscured"

Id. at 36a.

The motion judge, relying on those State Police observations, concluded that there was "a reasonable particularized suspicion that the driver of the van was engaged in illegal activity that included the processing and packaging of marijuana for distribution", at 38a.

The Appellate Division rejected Petitioner's arguments as to the "investigatory" motor vehicle stop and affirmed "the motion judge's conclusion that there was ample basis for the police officers to have a reasonable, objective, particularized suspicion that the occupants [sic] of the van were engaged in drug activity", at 4a. The Appellate Division never acknowledged, and thus never analyzed, Petitioner's argument:

> . . . that there was no reliability established as to any details supplied by the untested informant and

> that there was no corroboration by the State Police of any suspicious activity at the Paton residence. Since there was no history of reliability as to the informants, and since no intimate hard-to-know aspects of the private life of any of the supposed participants had been provided, there was nothing in the tip to justify a search and/or seizure.

Petitioner's Appellate Division brief

This Court has noted that the validity of a seizure must be evaluated by the facts which were available at the moment of seizure, *Florida v. J.L.*, 529 U.S. 266 (2000). At that moment, contrary to the motion judge's corroborated circumstance (1), it was *not known* that the van was "owned by an individual who had been identified by at least one confidential source as a participant in the illegal activity (i.e. Emil Gardner)". The ownership of the van was not determined until after Trooper Myers had stopped it. As to circumstance (3), "the appearance at the scene of a station wagon owed by another individual identified as a participant in the illegal activity" is hardly suspicious given that this "individual" was Ronald Paton whose home was under surveillance. As to circumstance (4), that shortly after the arrival of the station wagon, "the van was driven away from the surveillance location" there was no police knowledge as to whether the same or a different person then drove the van away. No one knew who drove the van on to the Paton property earlier that day nor, for that matter, did Det. Silver know whether anyone remained on the premises thereafter, during [cited circumstance (2)] the four-hour "extended period of inactivity". Finally, as to the last cited circumstance (5), that the "van was parked in such a way as to be partially obscured", the only obscure aspect was that Detectives Silver

and DeSantis could not read the license plate and do a registration look-up from their own undercover vehicles upon their return from lunch at 12:20 p.m. More to the point, the van was able to be observed and a determination could easily be made when the van was leaving the property so that the license plate could then be clearly observed. In that regard, had Trooper Myers been given standing instructions to follow the van if it left the property and radio in the license tag number to get a properly legal motor vehicle look-up, there would have been no constitutional contretemps created as to this "investigatory" motor vehicle stop.

As to the five circumstances cited by the motion judge: No. (1) [identification of Emil Gardner as the owner of the van] was factually wrong, No. (3) [Paton arrives at his own home] is eminently innocent while No. (2) [four hour extended period of inactivity] and No. (4) [van leaves after station wagon arrives] both fall into that category characterized by the Ninth Circuit as "dammed if you do, equally dammed if you don't", *United States v. Arvizu*, 232 F.3d at 1249, quoting *United States v. Montero-Camargo*, 208 F.3d 1122 at 1136 (9th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 211 (2000). Had activity been noted during the 4 hours and had the van not been driven away after the station wagon arrived, would not Det. Silver have as easily concluded that the conspirators were engaged in criminal activity "consistent with the function of processing and packaging marijuana", 36a and would not his standby instructions to stop the vehicle still have been followed by road Trooper Myers? Finally, any suspicious quality to No. 5 [van partially obscured] was not explained. Its quixotic quality is however apparent: the driver of the van parked it in such a way as to allow it to be visible from the road while hiding only the legibility of the license tag, hardly the handiwork of clever criminals. None of those five

cited circumstances are (as corrected) indicative of criminal conduct with the motion judge herself characterizing those circumstances as "otherwise seemingly non-criminal acts", 38a.

The stated purpose for the State Police surveillance was "to corroborate the information provided by confidential source No. 3, [to secure] a search warrant for the premises", at 27a. However, without observation of any activity, Det. Silver [upon his return from lunch to find a van parked on the Paton property] instructed Trooper Myers "to be on standby to stop the van should it leave the property", 28a. Presumably, identification of Emil Gardner (in whose name a Ford van was registered) or his ownership of that van would corroborate the information only provided in No. 3's tip that petitioner was also a participant in the criminal enterprise. However, unappreciated by Det. Silver and unexamined by the Appellate Division, was that Trooper Myers' stop of the van was a "seizure" requiring, as a condition precedent, some level of constitutional certainty, presumably reasonable particularized suspicion.

Here, this untested informant lacked personal knowledge as to "whether the harvested crop was at Mr. Paton's property" and thus provided police with effectively, an anonymous tip because that information was secured by the untested informant in a telephone call to an unidentified individual. That anonymous tip neither provided hard-to-know information nor predicted future behavior of any of the supposed participants. The seizure (investigatory stop) of the motor vehicle was improper because the stop was undertaken not because of some reasonable suspicion of criminal activity but rather as an attempt to corroborate information provided by confidential source No. 3 and his/her unidentified source whom he/she telephoned from the State Police barracks.

REASONS FOR GRANTING THE WRIT

This Court recently heard argument in *United States v. Arvizu*, 232 F.3d 1241 (9th Cir. 2000). The Government's contention in *Arvizu* is, among other things, that the appellate court improperly and categorically rejected certain factors or circumstances relied upon by the trial court and advanced by the border agent and in doing so, ran afoul of this court's totality-of-the-circumstances test.

This Petition is similar to *Arvizu* in that no criminal or unusual activity was observed by law enforcement. Indeed, the facts of this Petition [anonymous tip, police observation of innocuous coming and going activity by unidentified individuals and "police training and experience" inference of suspicion based on equivocal fact of extended period of inactivity at the surveillance scene] are more closely akin to another Arizona search invalidated by the *Arvizu* panel, *see United States v. Thomas*, 211 F.3d 1186 (2000) ["police training and experience" inference of suspicion based on equivocal fact of distinctive "sound" of dropped marijuana bale].

This Petition however, also presents other considerations which should be incorporated into the totality test, *i.e.*, (1) whether independent conduct of law enforcement [issuing a standing order at the beginning of a lengthy surveillance period to stop a motor vehicle] can vitiate a claim of reasonable suspicion which is based solely on observations of non-criminal conduct and, (2) whether trial and appellate courts, when considering the "whole picture", should closely scrutinize inferences of suspicion based on observed non-criminal facts and weigh those inferences along with all other non-criminal conduct observed by law enforcement for which no inference of suspicion is claimed.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN P. MORRIS
Attorney for Petitioner
142 W. Broad Street, Suite B
Post Office Box 299
Bridgeton, New Jersey 08302
(856) 453-1000

APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED SEPTEMBER 6, 2001 AND FILED SEPTEMBER 10, 2001

SUPREME COURT OF NEW JERSEY

C-13 September Term 2001

51,271

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMIL GARDNER,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3231-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

Appendix A

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of September, 2001.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX B — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED AND DECIDED MARCH 19, 2001

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3231-97T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMIL GARDNER,

Defendant-Appellant.

Argued February 27, 2001 — Decided MAR 19 2001

Before Judges Conley and Wecker.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 95-10-01083-I.

* * *

PER CURIAM

Following a jury trial, defendant Emil Gardner was acquitted of various drug charges[1], but convicted of two

1. Defendant's brother, Bruce Gardner, was indicted on the same drug charges, along with co-defendant Ronald Paton. Bruce and Paton (Cont'd)

counts of second degree official misconduct. *N.J.S.A.* 2C:30-2b. Concurrent custodial terms of seven years were imposed, along with the necessary fines and penalties. On appeal, Emil contends:

POINT I DEFENDANT'S POST-VERDICT MOTIONS FOR DISMISSAL/ACQUITTAL OF THE OFFICIAL MISCONDUCT COUNTS OF THE INDICTMENT, THE ONLY COUNTS ON WHICH HE WAS CONVICTED, SHOULD HAVE BEEN GRANTED BY THE TRIAL JUDGE. THERE WAS NO COMPETENT EVIDENCE THAT HE KNOWINGLY FACILITATED THE CRIMINAL CONDUCT OF CO-DEFENDANT BRUCE GARDNER IN THE LATTER'S POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA (COUNT 4 OF INDICTMENT) OR THAT HE KNOWINGLY ALLOWED AN UNLICENCED DRIVER, HIS BROTHER BRUCE GARDNER, TO OPERATE A MOTOR VEHICLE (COUNT 5 OF THE INDICTMENT). ADDITIONALLY, THERE

(Cont'd)
pled guilty to a drug offense and testified during the trial. In a prior opinion, we affirmed Paton's conviction and sentence. *State v. Paton*, No. A-160-97T5 (App. Div. July 16, 1998). We also affirm Bruce's conviction and sentence in an opinion filed simultaneously with this opinion. *State v. Bruce Gardner*, No. A-4756-97T3. We refer to each of the Gardner defendants by their first names in our opinions for ease of identification.

WAS NO EVIDENCE OF ANY CONDUCT BY THIS DEFENDANT, A MILLVILLE POLICE OFFICER, WHILE ACTING ON DUTY NOR ANY CONDUCT OFF DUTY WHEREIN HE EXHIBITED APPARENT AUTHORITY OF HIS OFFICIAL POSITION. FINALLY, HIS ACQUITTAL ON THE FOUR DRUG COUNTS OF THE INDICTMENT REQUIRES THAT THE OFFICIAL MISCONDUCT COUNT OF KNOWINGLY FACILITATING HIS BROTHER'S MARIJUANA OPERATION REQUIRES ACQUITTAL.

POINT II THE DEFENDANT'S NEW TRIAL MOTION SHOULD HAVE BEEN GRANTED AS THE SUPPRESSION OF STATE POLICE REPORTS AND PLEA NEGOTIATIONS WITH CO-DEFENDANT BRUCE GARDNER CONSTITUTED SUPPRESSION OF IMPEACHING/ EXCULPATORY EVIDENCE.

POINT III MOTION TO SUPPRESS WAS IMPROPERLY DENIED BY THE TRIAL JUDGE. THE STOP OF THE MOTOR VEHICLE REQUIRED PROBABLE CAUSE AND SUCH WAS NOT PRESENT. ADDITIONALLY, EVEN AS TO A "REASONABLE PARTICULARIZED SUSPICION" STANDARD, THAT LESSER STANDARD WAS NOT SATISFIED BECAUSE OF THE

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INADEQUATE DETAILS OF THE TIP AND THE FAILURE TO CORROBORATE.

We reject these contentions. As to point III, we agree with the motion judge that probable cause was not required for the initial investigatory stop. *State v. Zutic*, 155 *N.J.* 103 (1998), therefore, is inapposite. As in our prior opinion in co-defendant Paton's appeal, *State v. Paton*, No. A-160-97T5 (App. Div. July 16, 1998), we affirm the motion judge's conclusion that there was ample basis for the police officers to have a reasonable, objective, particularized suspicion that the occupants of the van were engaged in drug activity.

We also reject the contention in point I that the verdict was beyond the weight of the evidence and was inconsistent with the acquittals. The official misconduct charges are set forth in counts four and five of the indictment. Count four relates to Bruce's drug activities. Count five relates to the vehicle Emil provided for him. The crux of defendant's contention as to the conviction on count four is that there was no evidence that Emil participated in the drug activity or knowingly facilitated Bruce's endeavor with the necessary criminal intent. Indeed, the jury seemed to think so, thus the acquittals on the drug charges.

That, however, was not the entire scope of the official misconduct charge under count four. Both the language of that count as well as the jury charge thereon included a charge of official misconduct pursuant to *N.J.S.A.* 2C:30-2b which provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself

or another or to injure or to deprive another of a benefit:

. . . .

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. . . .

In this respect, the jury was charged in part:

> or the state must prove that the defendant knowingly refrained from performing a duty which was imposed upon him by law or was clearly inherent in the nature of his office. This provision refers to a public servant who knowingly refrains from performing an official, nondiscretionary duty, which is imposed upon him by law, or which is clearly inherent in the nature of his office. The duty to act must be so clear that the public servant is on notice as to the standards that he must meet. In other words, the failure to act must be more than a failure to exhibit good judgment. In addition, the state must prove that the defendant knew of the existence of his nondiscretionary duty to act prior to the incident in question.

And, although the Prosecutor's summation included arguments as to Emil's involvement in the drug activity, its primary focus was upon the evidence that supported a conclusion that, at the least, he knew Bruce was involved and did nothing. Thus, the prosecutor said:

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Count Four is official misconduct. Now the law on that, again the Judge will describe but there's a couple of different choices here and with respect to the official misconduct there that relates to the marijuana itself. So whether or not he — you believe he knew about the second degree amount and the third degree amount or just one of them, or he just turned a blind eye toward it, see and this is important to the official misconduct count, *because the official misconduct count doesn't require that he actually be a participant in the marijuana operation. All it requires is that he had knowledge of its existence and he did nothing about it as a sworn police officer.*

So at the very minimum *if you think that Officer Gardner because of all our elephants that we can trip over and all of the drugs that we seized and the stinking, reeking marijuana up in the attic that he says he didn't smell, if you think he was turning a blind eye to all of that for the benefit of his brother, so that his brother would not get caught, then the official misconduct count in count four, the State posits you're charged to deliver a guilty verdict if you believe those things.*

. . . .

So on the official misconduct count again, there are more levels that you could certainly find him guilty of but that floor level, the easiest one, the easiest one is that he turned a blind eye. If you

believe he had any more knowledge than that again, that establishes his guilt further.

[Emphasis added.]

There was overwhelming evidence of the State's "blind eye" theory. It was undisputed that Emil had helped Bruce unload and store Bruce's growing and harvesting equipment in Emil's shed and garage. Some of the equipment was in boxes, but the jury could have concluded some was not and that Emil, as a police officer and aware of Bruce's prior drug record, knew that it was not for innocent use.[2] In addition, Bruce and co-defendant Paton testified that defendant had been at Paton's premises where the marijuana was drying and was in a position to have seen it in the attic or, at the least, as a trained police officer, smelled its presence. There is no basis for us to disagree with the jury's evident conclusion that Emil was aware of Bruce's illegal activity and should have, but did not, arrest him.

We reject defendant's contention that to be convicted of official misconduct under count four, there must have been evidence of improper use of his status as a police officer. He relies upon *State v. Hinds*, 143 *N.J.* 540, 541-42 (1996) ("the [off-duty] officer's conduct was sufficiently related to his official status to constitute the crime of official misconduct");

---

2. When Emil's garage and shed were ultimately searched, the police discovered such items as a water pump, PVC pipe filled with seeds, bag with seeds and vegetation on the floor, bags of fertilizer, a flat for growing pots, wire fencing, deer and rabbit repellant, plant food, a measuring scale, sprayer, more than 2000 growing pots, lights, moth balls and a power supply box.

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State v. Bullock, 136 N.J. 149, 156-57 (1994) ("we briefly address the issue whether his conduct sufficiently related to his office to satisfy the requirements of *N.J.S.A.* 2C:3-2a . . . . [w]e conclude that defendant's conduct in both incidents sufficiently related to his office as a state policemen."); and *State v. Johnson*, 127 *N.J.* 458 (1992).

State v. Johnson has no bearing upon the issue here as the only issue addressed was entrapment. Moreover, there is no indication in the Court's decision that the charge of official misconduct arose under *N.J.S.A.* 2C:30-2b.

In *State v. Bullock*, the issue was whether a suspended State Trooper remains a public servant for purposes of official misconduct. *Bullock*, 136 *N.J.* at 150. The officer identified himself as a member of the "New Jersey Task Force" while pretending to arrest a drug dealer and he identified himself as a State Trooper when he was pulled over by a Hackensack Police Officer. Although the issue was not raised by the defendant, the Court nevertheless "briefly address[ed] the issue of whether his conduct sufficiently related to his office to satisfy the requirements of *N.J.S.A.* 2C:30-2a." *Bullock*, 136 *N.J.* at 156. Subsection (a) applies to public servants who commit an act relating to their public office but constituting an unauthorized exercise of official functions.[3]

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3. *N.J.S.A.* 2C:30-2a provides that official misconduct arises where a public official "commits an act relating to his office but constituting and unauthorized exercise of his official functions, knowing that such an act is unauthorized or he is committing such an act in an unauthorized manner."

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State v. Hinds does involve official misconduct under *N.J.S.A.* 2C:30-2b, but it does not help defendant. There an off-duty officer conspired with the security manager at Caldor to engage in shoplifting. The question was "whether an off-duty police officer who conspires with the private security manager of a store to engage in shoplifting may be found guilty of official misconduct." *Hinds*, 143 *N.J.* at 541. The Court observed that the charge of misconduct under "[s]ubsection b, the 'omission to act' phase of this offense, has reference to a public servant who consciously refrains from performing an official non-discretionary duty, which duty is imposed on him by law or which is clearly inherent in the nature of his office." *Hinds*, 143 *N.J.* at 545 (quoting the 1971 Commentary of the Criminal Law Revision Commission). Under subsection (b), the public servant must know of his non-discretionary duty to act; the failure to act must be more than a breach of good judgment. *Id.* at 545-46. Although there is no law prescribing the duties of police officers, "such duties are inherent or implicit in the nature of the office." *Id.* at 546 (citing *State v. Maioranna*, 225 *N.J. Super.* 365, 371 (Law Div. 1988), *aff'd*, 240 *N.J. Super.* 352 (App. Div. 1990), *certif. denied*, 127 *N.J.* 327 (1991)). The *Hinds* Court found ample basis for the jury to convict under subsection (b) where:

> The jury . . . found that [the security manager] was a thief. *That being so, [the police officer] had a duty to report [the security manager's] crimes.*
>
> [*Hinds*, 143 *N.J.* at 547-48 (citing *Robey v. State*, 484 *N.E.*2d 628 (Ind. Ct. App. 1985) (duties of police officer include arresting persons committing a crime in the officer's presence,

thus, officer expected to apprehend shoplifters) (emphasis added).]

See e.g. State v. Dunphy, 19 *N.J.* 531, 534 (1955) (nonfeasance charge supported by evidence that defendant chief of police knowingly failed to enforce gambling laws against bookmaker); *State v. Marchese*, 14 *N.J.* 16 (1953) (evidence of gambling at two locations one of which defendant, a police officer, owned and one of which his nephew owned; defendant's active management of one and use of his former telephone number in the other provided ample basis for conviction of malfeasance arising from failure to detect and arrest persons conducting the gambling operations). *Cf. State v. Steensen*, 35 *N.J. Super.* 103, 112 (App. Div. 1955) (failure to report fellow officer's wrongful acts might subject officer to departmental disciplinary proceedings or indictment).

Certainly when a police officer, even off duty, sees a drug offense being committed in his presence, inherent in the responsibilities of his job is to either make an arrest or report the criminal activity. While the misconduct statute also requires proof that the misconduct was engaged in "with purpose to obtain a benefit for himself or another . . . ," *N.J.S.A.* 2C:30-2, at the least the jury could conclude that Emil's nonfeasance was intended to benefit Bruce.

Count five is premised upon Emil's knowledge of Bruce's operation of the vehicle Emil registered and insured for him at a time Bruce's license was suspended for DWI.[4]

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4. In this respect, count five charges a violation of *N.J.S.A.* 39:3-39(b). Now repealed, at the time of the offense and verdict that

(Cont'd)

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Defendant's sole contention as to his conviction of this count is that "[t]here was no evidence at trial of Bruce Gardner's operation of a motor vehicle in the presence of his brother Emil Gardner . . . . The only proof of operation . . . was by negative inference, to wit, the Prosecutor argued that since Emil Gardner did not advise the New Jersey State Police at the time he was interrogated . . . that his brother had been driven to Emil Gardner's Millville residence by a driver, that that indicated that Bruce had actually driven himself and Emil was aware of it."

There was, however, more than "negative" inference. In his police statement provided to the jury during the trial, Emil said that Bruce was the sole driver of the vehicles insured by him, although he also said that he occasionally chauffeured him and knew that Bruce had other helpers drive the vehicles. Bruce testified that originally when Emil agreed to register and insure the vehicles, the agreement was that he would have one of his helpers drive Bruce around. However, subsequently, the person who had been driving Bruce left. The clear implication was that he, then, drove the vehicles himself. As to Emil's awareness of that, Bruce was asked during trial when he brought his drug equipment to the defendant's house "[y]ou brought all that stuff from your house in one load, didn't you?" and "did you pull up into his driveway?" and "you parked in the driveway and then your brother starts helping you unload it," to all of which Bruce replied "yes." In all of the testimony and statements by both

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(Cont'd)
statute stated "[n]o person owning or having control or custody of a [registered] motor vehicle . . . shall allow the vehicle to be operated by a nonlicensed driver . . . ."

Emil and Bruce concerning the unloading of the equipment at Emil's house, it is clear that the only persons there were Bruce and Emil. The inference that Bruce drove the vehicle to Emil's and that Emil knew that is too clear to ignore.

We briefly comment upon defendant's *Brady*[5] contention in point II. Potential *Brady* violations arise when a defendant discovers after conviction evidence that was not previously disclosed by the Prosecutor and which reasonably would have resulted in a different result. That is not what occurred here. The critical document is a November 1, 1995, police report that was the product of a meeting with Bruce and the police of which defendant was not aware. The report surfaced during counsel's cross-examination of a State's witness. It is evident from sidebar colloquies that the trial judge would have permitted counsel to thereafter use the report in cross-examining Bruce. For reasons we are not told, that was not done.[6] Any error, then, was harmless. *See State v. Marshall*, 123 *N.J.* 1, 133-34 (1991), *cert. denied*, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993); *State v. Scherzer*, 301 *N.J. Super.* 363, 432 (App. Div.), *certif. denied*, 151 *N.J.* 466 (1997).

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5. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

6. The record contains unsupported statements by the prosecutor that although the report does not disclose it, Emil's involvement in the drug activity was a subject of Bruce's statements during this meeting. It may be that is why counsel chose not to use the report during the trial.

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Moreover, not only did defendant obtain the report during the trial and could have used it to cross-examine Bruce, it is not particularly material. Insofar as showing police enticement to explain Bruce's inculpation of Emil, the report is merely cumulative of other evidence counsel had available. As to its reference to a driver Bruce had used, the record, too, contains this evidence, as Bruce so testified during the trial. The critical issue, however, as to the charge under count five, was whether Bruce drove his vehicle to Emil's when they unloaded and stored his equipment in Emil's shed and garage. As to that the November 1, 1995, report is not helpful to defendant.

Affirmed.

APPENDIX C — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION IN *STATE OF NEW JERSEY v. PATON*, DATED AND DECIDED JULY 16, 1998

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-160-97T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RONALD T. PATON,

Defendant-Appellant.

Submitted July 7, 1998 — Decided JUL 16 1998

Before Judges Skillman and Wefing.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County.

* * *

PER CURIAM

Defendant was indicted together with codefendants Bruce and Emil Gardner for second degree conspiracy to distribute marijuana, in violation of *N.J.S.A.* 2C:5-2, second degree possession of marijuana with the intent to distribute,

in violation of *N.J.S.A.* 2C:35-5b(10), and fourth degree possession of marijuana, in violation of *N.J.S.A.* 2C:35-10a(3).[1]

Defendants filed a motion to suppress the evidence upon which these charges were based. After a two day evidentiary hearing, the trial court issued a lengthy written decision dated January 2, 1997, denying the motion. Subsequently, defendant entered into a plea bargain pursuant to which he pled guilty to a charge of third degree conspiracy to distribute marijuana and the other charges were dismissed. The court sentenced defendant to a two year term of probation conditioned upon him testifying truthfully at the trials of the codefendants[2] and performing 100 hours of community service. The court also directed the forfeiture of all cash and property seized from defendant and imposed the statutorily mandated penalties and fees.

On appeal, defendant makes the following arguments relating to the denial of his motion to suppress:

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1. The indictment also included various other charges against the codefendants.

2. A jury found codefendant Emil Gardner guilty of two counts of official misconduct and acquitted him of the drug charges. The court sentenced this codefendant to concurrent terms of seven years imprisonment. His appeal is now before the court under docket number A-3231-97T1. Codefendant Bruce Gardner pled guilty pursuant to a plea bargain to possession of marijuana with the intent to distribute, and the court sentenced him to a term of eight and one-third years imprisonment. His appeal is now before this court under docket number A-4756-97T3.

Appendix C

I. THE INITIAL STOP OF THE VAN WAS UNLAWFUL BECAUSE THERE WAS NO REASONABLE PARTICULARIZED SUSPICION THAT THE OCCUPANT(S) WAS (WERE) INVOLVED IN CRIMINAL ACTIVITY.

II. THE SEARCH WARRANT APPLICATION, AFTER REDACTION OF THE TAINTED EVIDENCE, FAILS TO ESTABLISH PROBABLE CAUSE FOR ISSUANCE OF THE WARRANT.

We reject defendant's arguments substantially for the reasons set forth in Judge Curio's thorough and well reasoned written decision. *See also State v. Zapata*, 297 *N.J. Super.* 160, 170-75 (App. Div. 1997).

Affirmed.

APPENDIX D — LETTER OPINION OF THE SUPERIOR COURT OF NEW JERSEY, CUMBERLAND COUNTY DATED JANUARY 2, 1997

SUPERIOR COURT OF NEW JERSEY
COURT HOUSE
BRIDGETON, NJ 08302
(609) 451-8000
FACSIMILE (609) 455-9490

GEORGIA M. CURIO
JUDGE

January 2, 1997

David R. Branco, Esq.
Assistant Prosecutor
43 Fayette Street
Bridgeton, New Jersey
08302

Peter L. Bruso, Esq.
1009 South Main Street
P.O. Box 1516
Pleasantville, New Jersey
08232

John P. Morris, Esq.
200 West Commerce Street
P.O. Box 299
Bridgeton, New Jersey
08302

Brock D. Russell, Esq.
706 North High Street
Millville, New Jersey
08332

RE: State v. Emil Gardner, Bruce Gardner and Ronald Paton
Indictment No. 95-10-01083

Appendix D

Dear Counsel:

This matter comes before the court on defendants' motion seeking to suppress evidence obtained from the October 11, 1995 search of a tan 1985 Ford Econoline van and as the result of a search conducted pursuant to a subsequently obtained search warrant.

Defendant, Emil Gardner, is charged in a six count indictment with Conspiracy, second degree; Possession of CDS with Intent to Distribute, second degree; Possession of CDS with Intent to Distribute, third degree; two separate counts of Official Misconduct, second degree and Possession of CDS, fourth degree.

Defendant, Bruce Gardner, is charged in the same indictment with Conspiracy, second degree; Possession of CDS with Intent to Distribute, second degree; Possession of CDS with intent to Distribute, third degree, and Possession of CDS, fourth degree.

Defendant, Ronald Paton, is also charged in the same indictment with Conspiracy, second degree; Possession of CDS with Intent to Distribute; second degree and Possession of CDS, fourth degree.

The court has heard the testimony of Detective Ron Tobolski of the New Jersey State Police which began on July 2, 1996 and concluded on July 3, 1996, the testimony of Detective John Silver of the New Jersey State Police taken July 3, 1996 and the testimony of Trooper William Myers of the New Jersey State Police taken July 3, 1996.

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The following written submissions have been considered:

letter brief submitted by counsel for defendant Paton dated January 3, 1996 in support of Motion to Suppress;

letter brief submitted by the State dated April 11, 1996 in opposition to Motion to Suppress;

letter brief submitted by counsel for defendant Emil Gardner dated July 2, 1996;

letter brief submitted by counsel for defendant Paton dated July 11, 1996;

letter brief submitted by counsel for defendant Bruce Gardner dated August 1, 1996;

letter brief submitted by counsel for defendant Emil Gardner dated August 12, 1996;

letter brief submitted by the State dated September 13, 1996;

letter brief submitted by counsel for defendant Paton dated September 13, 1996; and

letter brief submitted by counsel for defendant Bruce Gardner dated December 5, 1996.

The court has reviewed the transcripts of July 2 and 3, 1996.

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The court finds the following facts:

- Trooper Detective Tobolski was given information in the summer of 1994 regarding defendant Bruce Gardner. This information came from an individual whose identity has not been disclosed in these proceedings and who shall hereinafter be referred to as confidential source No 1.

- Confidential source No. 1 had received a motor vehicle summons but was made no promise concerning disposition of same. Indeed he/she seemed not to be seeking favorable consideration and professed to be motivated by the fact that his/her knowledge had been "bothering" him/her for a long time.

- Confidential source No. 1 advised that defendant Bruce Gardner was involved in growing marijuana plants near Union Road partially in Maurice River Township and partially in the City of Vineland and near Route 49 in an area known as the DeCarlo Tract. Further, he/she indicated that the plants were grown in pots in various locations in wooded areas to avoid detection. Upon harvest, the yield was brought to an unknown location for processing.

- Some of the information imparted by confidential source No. 1 was based on personal observation and some was based on what he/she had learned from others.

- In response to the information provided by confidential source No. 1, Trooper Tobolski, with the source and his supervisor, visited a specific location in the woods in the DeCarlo Tract. This location had been given by

confidential source No. 1. Only a cleared area with no growing vegetation or debris was found, despite the source's belief that the crop had not yet been harvested.

- Also during the summer of 1994, less than one month after having had contact with confidential source No. 1, additional information concerning defendant Bruce Gardner and the marijuana operation was provided to Detective Tobolski by another confidential source. This individual shall hereinafter be referred to as confidential source No. 2.

- Confidential source No. 2 indicated, based on his/her personal observations and conversations with others, that an individual by the name of Tom Hoffman was selling drugs in Leesburg and that his supplier was Bruce Gardner.

- Following contact with confidential sources Nos. 1 and 2, Tobolski undertook criminal history lookups concerning Bruce Gardner and Thomas Hoffman.

- After contact with confidential source No. 1 and confidential source No. 2, Tobolski passed the information on to Detective Husband of the Detective Bureau. Tobolski was advised to take no further action as there was not sufficient "concrete" information.

- Between October 1, 1995 and October 8, 1995, some 16 months or so after contact with confidential sources Nos. 1 and 2, yet another individual came forward with information. This additional source of information shall be referred to hereinafter as confidential source No. 3.

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- The State Police knew the name and address of each of the sources but have protected the identity of each.

- Confidential source No. 3 disclosed that Bruce Gardner and Tom Hoffman were involved in growing marijuana in the area of Route 49 and Union Road, that the marijuana had recently been harvested and brought to the home of defendant Ronald Paton and was being dried and was about to be processed.

- The Paton property is located at 4540 Route 47 in Delmont.

- Shortly after the initial disclosure of information by confidential source No. 3, Tobolski again met with no. 3, this time with New Jersey State Police Detective John Silver and members of the Cumberland County Narcotics Task Force also present. During this second meeting, he/she reiterated that the marijuana was at the residence of Mr. Paton and added that there may be a Millville Police Officer, Emil Gardner, involved in the scheme, who had stored last year's marijuana harvest.

- Tobolski did not undertake any effort to determine whether confidential source No. 1 and confidential source No. 2 were connected in any way nor whether they had any connection to No. 3.

- Tobolski testified that he had no reason to believe that the information he got from all three was simply being recycled one to the other.

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- Confidential source No. 3's first contact with Tobolski was by telephone.

- During that telephone conversation, confidential source No. 3 indicated that he/she had knowledge that Bruce Gardner was involved in manufacturing and selling marijuana and wanted to talk to Tobolski about same. They met at the Port Norris Barracks.

- At the face to face meeting, confidential source No. 3 advised that marijuana had been grown off of Union Road and in the DeCarlo Tract near Route 49. The exact location was not known. Same had been harvested and was being stored at defendant Paton's premises in Delmont. It was being dried and would then be processed for distribution. No. 3 named Officer Emil Gardner as a participant in the operation.

- Confidential source No. 3 knew or was able to ascertain to what location the harvested marijuana crop was brought. Confidential source No. 3 disclosed that the crop had been taken to the Paton premises.

- Confidential source No. 3 disclosed that the subject marijuana scheme had been operating in the Cumberland County area for the past several years.

- Confidential source No. 3 in his/her first telephone conversation and first personal meeting with Tobolski did not mention Emil Gardner as being involved in the scheme. However, during the subsequent meeting involving confidential source No. 3, Tobolski and

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Detective Silver, No. 3 identified Emil Gardner as being involved.

- Confidential source No. 3 who came forward in October 1995 had information also based on personal observation. However, the personal knowledge was not as to where the marijuana had been grown nor whether the harvested crop was at Mr. Paton's property.

- According to Tobolski, the personal observations made by confidential source No. 3 corroborated the hearsay information which was learned by confidential source No. 3 and related by him/her to Tobolski.

- During Tobolski's initial personal interview with confidential source No. 3, No. 3 made a telephone call to either ascertain or confirm the location of the harvested crop.

- Confidential source No. 3 indicated that there was a good probability that the harvested crop was at Paton's. This information was not related as an absolute certainty. This information was based on what someone else had told him/her.

- A background check was done on confidential source No. 3 as well as all of the individuals named as participants by him/her.

- On the same day that Silver and Tobolski met with confidential source No. 3, they drove by the Paton residence to ascertain its exact location which was also confirmed through a motor vehicle lookup.

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- Surveillance of the Paton property was undertaken on October 11, 1995 by Detective Silver and Detective DeSantis. They were in separate undercover vehicles. Surveillance commenced at about 11:00 a.m. Initially, the surveillance was conducted by the Troopers driving by the area, *i.e.*, the Troopers would drive by, park for awhile near the fire house down the road and then drive by again.

- The surveillance was undertaken to corroborate the information provided by confidential source No. 3 in order that ultimately a search warrant for the premises could be obtained.

- The detectives took about a half hour break for lunch and returned to the area at about 12:30 p.m. Upon returning to the area, a tan colored Ford Van was observed to be parked behind the outbuilding, partially obscured from view.

- The surveillance lasted through the day until about 4:00 p.m.

- There were two structures on the property; the residence and the outbuilding. They were about 30 feet apart.

- No activity was observed between the time the van was noticed at about 12:20 p.m. until approximately 4:00 p.m.

- DeSantis parked his vehicle at the fire house. Silver situated himself at the first cross street near the residence. The detectives kept the residence under view from those stationary locations.

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- A red station wagon drove past Silver's vehicle. The driver made eye contact with Silver. The vehicle then entered the Paton driveway and came to rest between the house and the outbuilding.

- Silver was unable to see the driver exit the red station wagon and could not ascertain whether that individual entered either of the structures.

- The van departed shortly after the station wagon's arrival.

- Trooper Myers and Trooper Gordillo, in an unmarked unit, stopped the van at about 4:20 p.m.

- A search warrant was executed later that night at the Paton residence.

- Prior to stopping the van, a call was made to the Millville Police Department and it was ascertained that defendant Emil Gardner was assigned to work the midnight shift.

- During the surveillance, no one who might be considered to be serving as a lookout was seen and no illegal activity was observed.

- Shortly after the first observation that the tan Van was at the Paton property, Myers was alerted to be on standby to stop the van should it leave the property. Silver had made a determination that he wanted to have the van stopped if it left the premises at any time while the property was under surveillance. He specifically wanted to ascertain, as part of his investigation, whether there

was an odor of marijuana detected about the individual or individuals who was or were in that vehicle and also wanted to identify any additional participants who may have been involved.

- The day before the surveillance was undertaken, a motor vehicle lookup was conducted concerning Emil Gardner showing that he was the owner of a 1985 tan Ford van. A motor vehicle lookup for Paton indicated that he owned a red station wagon.

- There was no motor vehicle offense committed by the van prior to the stop.

- Myers was able to identify the driver of the van as Bruce Gardner. He identified him on sight having previously been familiar with Bruce Gardner through his many years on patrol in the area.

- As soon as Myers got out of his Troop car, he could smell marijuana. He characterized the odor as "very powerful."

- Looking through the window of the van, Myers saw bundles in burlap and plastic bags with green leaves protruding. Myers made the same observations as he was speaking to the driver and looking into the storage area of the van.

- Bruce Gardner was asked to exit the van, he was handcuffed and transported to the barracks. The van was brought to the barracks.

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The foregoing facts are based on the rather extensive testimony of the Troopers involved. As to their credibility, the court makes the following observations:

- The court finds Detective Tobolski to be credible. He has been a State Trooper for eleven years. He has had training in handling narcotics investigations and has been involved in same over his years in law enforcement. He did not equivocate in his responses. He was not evasive. He answered candidly. He was thoughtful while testifying and did not simply recite information by rote. He looked directly at the questioner and from time to time faced the court with a direct gaze.

- Trooper Myers testified in a very forthright manner. He is a ten year veteran. He was cooperative, direct and responsive. The court finds him to be credible.

- Detective Silver, though on occasion seemed to be sparring somewhat with defense counsel, did appear to be giving forthright responses to the questions put to him. He did not equivocate nor were there inconsistencies in his testimony. In fact, the testimony of Silver concerning what transpired before the conduct of the surveillance was corroborated by the testimony of Tobolski. Silver is a veteran of sixteen years as a State Trooper. He has been involved with narcotics investigations since 1987. From 1990 through approximately June 1996, he was assigned to the Special Operations Unit of the Criminal Enterprise and Racketeering Bureau focusing primarily on narcotics investigations. He has had multiple seminars and training sessions regarding drug investigations including, in 1991,

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U.S. Drug Enforcement Administration training concerning marijuana eradication and detection. In 1991, he was the coordinator for the Nationwide Domestic Cannabis Suppression Program of the U.S. Drug Enforcement Administration. He has impressive credentials in the field of law enforcement involving narcotics investigation. The court finds the testimony of Detective Silver to be credible.

I. *STOP OF THE 1985 FORD ECONOLINE VAN*

The issue before the court is whether, under the circumstances of this case, the motor vehicle stop of one of the codefendants was appropriate under the Fourth Amendment of the Federal Constitution and under the New Jersey Constitution.

The court concludes that the stop of the 1985 tan Ford Econoline Van driven by Bruce Gardner and registered to Emil Gardner on October 11, 1995 was an appropriate investigatory stop.

It is axiomatic that the Fourth Amendment of the United States Constitution and Article I of the New Jersey Constitution do not guarantee against all seizures by police but against only those that are unreasonable.

In *Terry v. Ohio*, 292 U.S. 1 (1968), the United States Supreme Court rejected a standard requiring a showing of probable cause to justify a brief investigatory detention, requiring instead something less than probable cause, specifically a reasonable and articulable suspicion.

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United States v. Cortez, 449 U.S. 411 (1981), allows an investigatory stop if, based upon the "whole picture", the detaining officer has a particularized and objective suspicion that the detainee is involved in criminal activity.

In determining whether there exists such a particularized suspicion, a court must consider the officer's objective observations.

> "The evidence collected by the officer is seen and weighed not in terms of library analysis by scholars but as understood by those versed in the field of law enforcement. A trained police officer draws inferences and makes deductions . . . that might well elude an untrained person. The process does not deal with hard certainties, but with probabilities. *Id.* At 418.

New Jersey Law has long recognized that in determining the reasonableness of a seizure, the interest of the State in effective law enforcement must be balanced against the individual's right to be protected from unwarranted police intrusion.

State v. Davis, 104 *N.J.* 490 (1986) held that:

> an investigatory stop is valid only if the officer has a particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing. The 'articulable reasons' or 'particularized suspicion' of criminal activity must be based upon

> the law enforcement officer's assessment of the totality of the circumstances with which he is faced. Such observations are those that, in view of the officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonably warrant the limited intrusion upon the individual's freedom.

Justice Garibaldi writing for the Court in *State v. Davis*, stated the jealousy with which individual freedoms and rights of privacy are guarded concluding however, that:

> common sense and good judgment nevertheless require that police officers be allowed to engage in some investigative street encounters without probable cause. Such encounters are justified only if the evidence, when interpreted in an objectively reasonable manner, shows that the encounter was preceded by activity that would lead a reasonable police officer to have an articulable suspicion that criminal activity had occurred or would shortly occur. *Id.* At 505.

In determining whether the stop of the 1985 Ford Econoline Van in the case here under review was a reasonable investigatory stop, this court is required to take into account the totality of the circumstances including the reliability of the information upon which the State Police investigation was initiated.

The State argues that the confidential sources in this case were concerned citizens and as such, their reliability is

presumed and the information supplied by them was sufficient to give rise to the articulable suspicion needed to justify the stop.

In *State v. Lakomy*, 126 *N.J. Super.* 430 (App. Div. 1974), a concerned citizen is defined as a cooperative member of the general public with no ties or connection with the criminal element, expected to be motivated by factors which are consistent with law enforcement goals. Information provided by such an individual is regarded as inherently trustworthy and a proper basis for police activity.

Parenthetically, it is noted that the court in *Lakomy* did not dismiss out of hand information based on hearsay, observing:

> The fact that the information included hearsay on the informant's part is a factor to be considered. It is by no means fatal, however, to the assessment of the credibility or the plausibility of the basic information related by the informant . . . (Citations omitted.)

The court disagrees that these sources are truly concerned citizens as that concept is contemplated in the case law. These three individuals were not ordinary citizens who, by happenstance, observed criminal activity and reported it out of a sense of civic obligation or motivated solely by a concern for the general welfare of the community. Although these sources have not been identified, it appears clear based on the fact that the troopers testified that at least some of the information was based on first hand observation, they were

not just individuals who fortuitously observed or learned of the criminal activity. Rather, these were individuals who in some way were connected to, if not the criminal activity itself, then, at the very least, the participants in the criminal activity or someone close to those participants. They cannot be equated with the concerned citizen in, for example, *State v. Davis*, *supra*, an individual who happened to be riding by an Exxon Service Station and saw two suspicious individuals and reported same to the police. Based upon the information given by the three sources in the instant case, it would be a fair inference that the sources, whose identities were known to the police but not disclosed, had some ongoing contact with the codefendants and/or intimates of the codefendants and access to such individuals from which to obtain information. As such, the court cannot simply assume that they were motivated by the common good and therefore cloak the information disclosed by them in a presumption of reliability.

Neither, however, are these sources truly confidential informants as that concept is contemplated by the case law. They are rather of a hybrid variety more aptly designated "untested informants" and as such some showing of reliability must be made. The information supplied does bespeak certain indicia of reliability. All three sources came forward with essentially the same or very similar information thereby each corroborating the other. *See*, *State v. Williams*, 251 *N.J. Super.* 617 (Law Div. 1991).

Observations of the State Police at the surveillance scene also serve to corroborate the information supplied by the sources. Specifically, the observations during surveillance

revealed that a van owned by an individual who had been identified by at least one confidential source as a participant in the illegal activity (*i.e.* Emil Gardner) was seen at the location at the time of the surveillance. The Troopers, through the motor vehicle lookup, had ascertained prior to commencing surveillance that Emil Gardner had a 1985 Ford Econoline registered in his name. Also at the surveillance scene, an extended period of inactivity, estimated to have been approximately four hours, after the van arrived at the premises, was consistent with the function of processing and packaging marijuana within the experience and training of the officers undertaking the surveillance. In addition, the appearance at the scene of a station wagon owned by another individual identified as a participant in the illegal activity shortly after which the van was driven away from the surveillance location raises suspicion. The van was parked in such a way as to be partially obscured.

The defense argues that the police surveillance yielded only innocuous observations, and nothing that would support a suspicion of criminal activity.

The reliance of the defense upon *State v. Kuhn*, 213 *N.J. Super.* 275 (App. Div. 1986), in support of this hypothesis is misplaced. In *Kuhn*, there was no tip, no information disclosed to the police regarding criminal activity by the defendant therein. Instead, that stop was initiated by the police officer based only upon his observation of otherwise legitimate or innocent behavior. (Three men standing together in a parking lot.)

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State v. Paturzzio, 292 *N.J. Super.* 542 (App. Div. 1996) is more apt. In that case, police had been given a tip by a previously unused confidential source. The tip advised that the defendant therein would be involved in a drug transaction. The tip also specified a physical description of the defendant, and disclosed that the defendant would be en route with another identified and described individual. Based upon that tip, surveillance was established. Surveillance yielded observations of the identified driver arriving at the residence where the defendant was staying. Shortly thereafter, the defendant Paturzzio left with the other female. The tip had also indicated that Paturzzio would be carrying a black backpack.

Once the vehicle was en route, the police stopped it. The two occupants meeting the description given by the source and the black backpack were observed. The court in *Paturzzio* held that the observations of the police during their surveillance constituted sufficient corroboration of the information provided by the source. Thus, the observation by the officers of seemingly innocent behavior, *i.e.*, getting into a car with a companion, when coupled with the information from the previously untested source was sufficient to justify the stop of the vehicle.

State v. Zutic, 294 *N.J. Super.* 367 (App. Div. 1996), is distinguishable. In that case, the court held that the police corroboration of innocuous details was not sufficient to support a finding of *probable cause*. In the instant case, the State need only show the lesser standard of reasonable particularized suspicion to justify the investigatory stop. Additionally, in the case here under review, the three

confidential sources corroborated each other and the police observations added another layer of corroboration to enhance the reliability of the information supplied. In this case, the observations of the police, which in one view may be said to be of entirely innocent behavior, includes seeing a vehicle owned by an alleged participant in the illegal activity at the scene, for a lengthy period of time which, based on the officer's training and experience could reasonably permit the inference that processing activities were going on consistent with the information supplied. The immediate departure of that van once the surveillance had been detected by the driver of the red station wagon, lends further suspicion to these otherwise seemingly non-criminal acts. The rather surreptitious manner in which that van was parked on the property, at least partially obscured behind the outbuilding lends further suspicion to these seemingly non-criminal acts. The information obtained by way of investigation that one of the principals, Emil Gardner, was not at work and not scheduled to work until the midnight shift, lends further suspicion to these otherwise seemingly non-criminal acts. (See, for example, *Alabama v. White*, 496 *U.S.* 325 (1990)).

Because of the degree of suspicion attached to the activities observed and the inferences reasonably to be drawn therefrom by experienced police officers, those corroborating observations lend sufficient reliability to the information obtained from the confidential sources such that there was a reasonable particularized suspicion that the driver of the van was engaged in illegal activity that included the processing and packaging of marijuana for distribution. Accordingly, the investigatory stop of that vehicle was justified.

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The scope of the seizure carried out by Trooper Myers was appropriate. There has been no issue raised concerning the search of the van based on the officers' plain view observations.

II. *SEARCH OF PATON PREMISES PURSUANT TO WARRANT*

The information yielded by the stop of the Econoline was included in the Affidavit in Support of the Application for the search warrant. Defense argues that same is tainted as the "fruit of the poisonous tree."

In view of the court's determination that the stop of the Econoline was appropriate, that argument is without merit.

Accordingly, for the foregoing reasons, defendants' Motion to Suppress Evidence based upon the stop of the 1985 Ford Econoline is denied as is the Motion to Suppress the evidence seized pursuant to search warrant at the Paton premises.

Very truly yours,

s/ Georgia M. Curio
GEORGIA M. CURIO, J.S.C.
GMC/ls